

# Food & Beverage

## LITIGATION UPDATE

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## LITIGATION UPDATE

### Legislation, Regulations and Standards

#### Federal Trade Commission (FTC)

##### [1] **FTC Staff Encourage FDA to Revise Food Labeling Policies in Effort to Combat Obesity**

Revising serving sizes to more accurately represent the amounts consumers typically eat and making such information “sufficiently clear and prominent” on package labels would help consumers make better dietary choices and lessen their confusion over current labeling practices, say FTC staff in [comments](#) submitted to the Food and Drug Administration’s (FDA’s) Obesity Working Group. FTC generated the comments following the working group’s November 2003 public workshop on possible connections between food labeling and weight management. Other recommendations FTC offers include (i) “allowing companies greater flexibility in making reduced calorie claims for foods,” (ii) “permitting comparative claims between different types and portion sizes of food,” and (iii) “allowing health claims that relate reduced calorie consumption to a reduction in risk of obesity-related diseases.” In evaluating the costs and benefits of new labeling rules, FTC suggests that FDA “create, solicit, and analyze consumer research” as part of the evaluation process. FDA’s Obesity Working Group is expected to present Commissioner Mark McClellan with final recommendations for agency action regarding obesity during February 2004.

### Alcohol and Tobacco Tax and Trade Bureau

##### [2] **Advocacy Groups Petition Agency to Require ‘Alcohol Facts’ Label**

Two advocacy groups are proposing a uniform [“Alcohol Facts” label](#) to the Alcohol and Tobacco Tax and Trade Bureau. In a [petition](#) submitted December 16, 2003, the Center for Science in the Public Interest and the National Consumers League urge the agency to require labels containing information about alcohol content, standard serving sizes, calories, and ingredients. The proposed label would also state that moderate drinking entails no more than one drink per day for women or two drinks per day for men.

Petitioners say they believe their “Alcohol Facts” label would do what Nutrition Facts labels do for packaged food. “Existing labeling rules are inconsistent, confusing, and don’t help consumers compare beverages’ alcohol or calorie content,” according to Consumers League President Linda Golodner. “While wine and hard liquor list alcohol content, beer doesn’t. And while ‘light’ beer and low-alcohol wines list calories, regular beer, wine, and hard liquor don’t.”



## Food and Drug Administration (FDA)

### [3] FDA-Sponsored Report from National Academies Calls for Updates to Nutrition Information on Food and Dietary Supplement Labels

Given that the “percent Daily Value” figures contained in Nutrition Facts boxes on food product labels are based on government-issued Recommended Daily Allowances from 1968, they should be updated to allow consumers to make better informed choices, according to a new report issued by a subcommittee of the Institute of Medicine’s (IOM’s) Food and Nutrition Board. The report, *Dietary Reference Intakes: Guiding Principles for Nutrition Labeling and Fortification*, urges U.S. and Canadian government officials to revise Daily Values using the current Dietary Reference Intakes (DRIs) that represent the latest information on the amount of various nutrients people need to consume on a regular basis to maintain good health and, where data are available, prevent chronic disease. U.S. and Canadian scientists began developing DRIs in the mid-1990s under the auspices of IOM’s Food and Nutrition Board. The report also recommends (i) Daily Values for saturated fatty acids, *trans*-fatty acids and cholesterol at the lowest possible levels, (ii) absolute values for all nutrients in Nutrition Facts and Supplement Facts boxes to help individuals who want to consume specific amounts of particular nutrients, and (iii) fortifying foods based only on documented public health needs as determined by regulatory agencies’ evaluations of dietary inadequacies in particular populations.

The Center for Science in the Public Interest responded to the IOM report by urging FDA to issue a proposed rulemaking with respect to the disclosure of refined/added sugars in the Nutrition Facts panel and disappointment that the report’s recommendations are not “stronger.” “I can only wonder how

much stronger the committee’s recommendations would have been if the committee had not been so top-heavy with food industry consultants and grant recipients,” CSPI Director Michael Jacobson was quoted as saying. “All but one of the committee members have had major or minor financial relationships with the food industry, including two people who serve on the boards of directors of trade associations,” he said. *See CSPI News Release*, December 11, 2003.

## U.S. Congress

### [4] New York Lawmaker Introduces Food Allergen Labeling Legislation

A new bill introduced by Representative Nita Lowey (D-N.Y.) would amend the federal Food, Drug and Cosmetic Act by establishing labeling requirements for allergenic substances in food products. “Major food allergens” under the [Food Allergen Labeling and Consumer Protection Act of 2003](#) include milk, eggs, fish, Crustacea, tree nuts, wheat, peanuts, and soybeans. The labeling requirement would also apply to spices, flavorings, colorings, or incidental additives that are or contain a known food allergen. Other provisions of the proposal would require the secretary of the Department of Health and Human Services to (i) produce a report detailing the unintentional contamination of various food products with major food allergens, (ii) conduct inspections of food manufacturing facilities to ensure compliance with labeling rules, (iii) issue a proposed regulation on use of the term “gluten-free,” (iv) convene an expert panel to review current research on food allergies, and (v) pursue revision of the Food Code with respect to guidelines for preparing allergen-free foods in restaurants, grocery store delicatessens and bakeries, and school cafeterias. The bill has been referred to the Committee on Energy and Commerce.



## United Kingdom

### [5] U.K. Wine & Spirit Association Responds to Government Analysis

The United Kingdom's strategy to reduce alcohol harm "needs to concentrate on a long-term program of research and education to produce a culture change away from binge drinking" toward a "Mediterranean model" of drinking in moderation, according to the Wine & Spirit Association (WSA). The recommendation is part of a [government submission](#) the association filed last week in response to an interim analytical report issued by the prime minister's Strategy Unit in September 2003. See [issue 50](#) of this Update, September 24, 2003.

The association believes its approach would be more effective than setting minimum prices, raising sales taxes or curbing the quantity of advertising. Product advertising has its major effect on market shares, not on the size of the overall market, according to the submission.

The WSA is a trade organization that represents approximately 200 businesses involved in trading wines and imported spirits in the United Kingdom.

## Other Developments

### [6] Beef Group to Create Pilot Labeling Program

A National Cattlemen's Beef Association task force is reportedly spearheading the group's efforts to create a pilot country of origin labeling program using existing U.S. Department of Agriculture (USDA) guidelines. "The key to this effort is coming up with a program that will create a net benefit to producers – that is, minimize the costs to cattlemen while maximizing the value to consumers," an association

spokesman was quoted as saying. A provision in the 2002 Farm Bill requires labeling of meat, fish and produce by its country of origin by September 2004; implementation of the law, however, would be delayed if Congress fails to approve appropriations for USDA to draft the labeling rules. See *National Cattlemen's Beef Association Press Release*, December 10, 2003; *Omaha World-Herald*, December 11, 2003.

### [7] Food and Drink Companies Banned from Participating in London's Olympics Bid

The group responsible for raising the £30 million necessary to bid on holding the 2012 Olympic Games in London is reportedly refusing donations from fast-food and soft drink companies for fear that the attendant advertising of the companies' products would "undermine the message that the games can deliver health benefits by motivating young people to take up sports." According to a news source, political organizations, arms manufacturers and tobacco companies have also been excluded from becoming bid sponsors. See *The Independent*, December 11, 2003.

## Media Coverage

### [8] Neil Buckley, "Have Fat Will Sue," *The Financial Times*, December 12, 2003

"In a little over a year, a scattered collection of nutritionalists, health campaigners and lawyers has coalesced into something that approaches a coordinated movement," according to this article. "There has still been only a handful of cases; none has made it to trial. But they have helped ensure that the long-overlooked obesity epidemic and its consequences are never out of the newspapers."

Buckley reviews a number of events summarized in this Update during the past year, including the June 2003 obesity litigation conference sponsored by the Public Health Advocacy Institute; demand letters

sent by John Banzhaf to fast-food companies and ice-cream parlors; and the dismissed lawsuit obese teenagers filed against McDonald's. The article also includes statements by potential plaintiffs' witnesses such as New York University's Marion Nestle and Yale University's Kelly Brownell. Referring to the pace of events involving obesity litigation and regulation, Brownell is quoted as saying that "it seems to me that what took 35 years with smoking is going to be compressed into 35 months."

## Scientific/Technical Items

### Sodium

#### [9] **British Researchers Claim Major Reduction in Salt Intake Would Cut Number of Strokes by 40 Percent**

Significant decreases in salt consumption could save more than 50,000 lives annually in the United Kingdom, according to newly published research in the journal *Hypertension*. F.J. He, et al., "How Far Should Salt Intake Be Reduced?" *Hypertension* 42: 1093-1099, 2003. Current public health recommendations suggest that individuals lower salt intake from 9 to 12 grams daily to 5 to 6 grams to help lower the risk of high blood pressure, heart disease and stroke. These researchers assert, however, that limiting sodium consumption to just 3 grams daily would reduce the number of strokes by approximately 40 percent. They estimate that some 80 percent of daily salt intake comes from processed foods and therefore encourage food manufacturers to limit the sodium content of such products.

## Advertising

#### [10] **Harvard Researchers Say Teens' Television Viewing Patterns Affect Food Choices**

New research indicates that the more television children watch, the fewer fruits and vegetables they consume, suggesting children might be replacing these healthy foods with the less healthier fare they see repeatedly advertised. R. Boynton-Jarrett, "Impact of Television Viewing Patterns on Fruit and Vegetable Consumption Among Adolescents," *Pediatrics* 112(6 Pt. 1): 1321-1326, 2003. Harvard School of Public Health researchers followed 548 adolescents over a 19-month period from October 1995 to May 1997, examining associations between changes in television and video viewing and shifts in fruit and vegetable intake. Initially, they found these children ate on average 4.23 servings of fruits and vegetables, well below the recommended five daily servings. As the study went on, however, those children who watched increasingly more television were shown to eat even fewer fruits and vegetables. For each additional hour of television viewed per day, children ate 0.14 fewer servings.



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## LITIGATION UPDATE

Food & Beverage Litigation Update is distributed by Mark Cowing and Mary Boyd in the Kansas City office of SHB. If you have questions about the Update or would like to receive back-up materials, please contact us by e-mail at [mcowing@shb.com](mailto:mcowing@shb.com) or [mboyd@shb.com](mailto:mboyd@shb.com). You can also reach us at 816-474-6550. We welcome any leads on new developments in this emerging area of litigation.

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